

# The Value of the Persistent Objector Doctrine in International Human Rights Law

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## Abstract

This article critically analyses the use of the persistent objector doctrine in unilaterally challenging the validity of Sexual Orientation and Gender Identity (SOGI) rights and the related state obligations. The persistent objector doctrine gives effect to state sovereignty and provides a mechanism through which states can object to a customary norm preventing the objecting state from incurring any legal obligations once the norm has emerged. The aim of this article is to reflect on whether the persistent objector doctrine could legitimately be used to negate state obligations that would naturally follow from the crystallisation of customary norms in the area of SOGI rights. In this sense the article is both concerned with analysing (not concluding on) current state practice in terms of understanding if and how the persistent objector doctrine is applied, and with gazing forward in terms of analysing whether, if customary law emerges to protect SOGI rights, the persistent objector doctrine could in fact be applied to limit or comprehensively shield states from SOGI-related obligations. This analysis takes place within the framework of the UNHRC Resolution 32/2, which creates an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, and of the responses of the seven African states that provided statements before the UNHRC in the process leading up to this resolution.

## Keywords

The persistent objector doctrine; customary international law; universalism; human rights; SOGI; LGBTQI.

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## 1 Introduction

This article critically analyses the use of the persistent objector doctrine in unilaterally challenging the validity of Sexual Orientation and Gender Identity<sup>1</sup> (SOGI) rights and related state obligations. The persistent objector doctrine provides a mechanism through which states can object to a customary norm, and it prevents the objecting state from incurring any legal obligations once the norm has emerged. The persistent objector doctrine gives effect to state sovereignty, and must be invoked at the inception of a specific state practice. As Voss points out, "persistent objection or support (eventually) impacts the strengthening or decaying of SOGI rights in international law".<sup>2</sup> However, as argued in this article, the inability of the persistent objector doctrine to account for the universality<sup>3</sup> of human rights law, a principle on which human rights law is founded, limits the influence of this mechanism on SOGI rights.

State practice, recognising SOGI rights in accordance with the Yogyakarta Principles plus 10,<sup>4</sup> for example, is currently increasing, as substantiated in this article, but the state practice of recognising SOGI rights is not yet constant and uniform, and there is undoubtedly state practice that contradicts this development. However, it is not the objective of this article to conclude on whether or not customary international law has developed to protect SOGI rights. That issue has been addressed by other authors with different results.<sup>5</sup> It is rather to reflect on whether the persistent objector doctrine could legitimately be used to negate state obligations that would naturally follow from the crystallisation of customary norms in the area of SOGI rights. In this sense the article is both concerned with analysing (not

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<sup>1</sup> This article acknowledges that in the term SOGI, the SO and GI concepts are neither mutually exclusive nor mostly overlapping. They are distinct concepts that may or may not intersect. However, for the purpose of this article, the SOGI rights concept will be viewed as one concept albeit with a multifaceted application. It is also important to note that the SOGI concept, as it is used in this article, does not include gender expression, as Resolution 32/2 does not include "expression" in its terminology.

<sup>2</sup> Voss 2018 *Hum Rts Rev* 4.

<sup>3</sup> As further defined under 3.

<sup>4</sup> International Commission of Jurists *Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007); and *Yogyakarta Principles Plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017).

<sup>5</sup> Clavier 2016 *Fordham Int'l LJ* 613-668; McGoldrick 2016 *Hum Rts L Rev* 613-668.

concluding on) current state practice in terms of understanding if and how the persistent objector doctrine is applied, and forward gazing in terms of analysing whether the persistent objector doctrine could in fact be applied if customary law emerges to protect SOGI rights, to limit or comprehensively shield states from SOGI-related obligations.

In June 2016 the United Nations Human Rights Council (UNHRC) took an important step towards protecting individuals against discrimination based on SOGI by passing Resolution 32/2 titled: *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity* (Resolution 32/2).<sup>6</sup> It established for the first time a mechanism overseeing the implementation of SOGI rights: An Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (hereafter the Independent Expert on SOGI rights). Resolution 32/2 importantly reiterated the universality of all human rights and reaffirmed that "all human beings are born free and equal in dignity and rights".<sup>7</sup>

Resolution 32/2, and the proceedings leading up to its establishment, provide a relevant framework within which an analysis of the value of the persistent objector doctrine can take place. It offers a limited scope within which it is possible to reflect on the reaction of states to the diverse state practice that is currently shaping the protection, or non-protection, of SOGI rights under international human rights law in support of or contrary to the principle of the universality of human rights law. The scope is further limited to the seven African states that provided statements before the UNHRC in the process leading up to Resolution 32/2.

It is important to note from the outset the different views on the meaning of the "universality" of human rights law (further discussed under 3) that dominated the discussion at the UNHRC. On the one hand, states not accepting SOGI rights often, as is evident from the discussion under 5, define "universal" as an account of unanimous state practice - in this context the practice of not viewing SOGI rights as human rights. From this perspective universality is garnered from states' actions and, importantly, is controlled by the same. Viewing universality from this perspective, SOGI rights become an expansion of human rights law and states that are

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<sup>6</sup> *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity* HRC Res 32/02, UN Doc A/HRC/RES/32/2 (2016).

<sup>7</sup> *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity* HRC Res 32/02, UN Doc A/HRC/RES/32/2 (2016) para 1.

unwilling to protect SOGI rights often deny this perceived development of the law based on cultural/religious grounds.

On the other hand, states accepting SOGI rights often refer to "universal" as the application of existing rights, such as the right to liberty and security of the person, to all human beings. This means that these rights are universal in their application to all human beings including lesbian, gay, bisexual, transgender, queer, and intersex persons. From this perspective universality cannot be garnered from states' practice alone and is importantly no longer controlled solely by state practice. This is what Lau refers to as the human rights regime's "universalist assumption" (further discussed under 4).<sup>8</sup> This assumption is visible for example in article 2 of the UDHR,<sup>9</sup> which refers to "[e]veryone" as entitled to all the rights and freedoms set forth in the UDHR "without distinction of any kind".

When evaluating the position of SOGI rights under international law, it is important to acknowledge that neither international nor regional human rights law contains a direct reference to SOGI rights in the same manner for example as the CEDAW<sup>10</sup> (protecting women against gender discrimination), or the CERD<sup>11</sup> (protecting against racial discrimination). Therefore customary international law becomes relevant because as long as there is no direct reference to sexual orientation and gender identity in international treaty law the "universalist assumption", as echoed for example in the UDHR, ICCPR<sup>12</sup> and ICESCR,<sup>13</sup> can be interpreted by state practice as inclusive or exclusive. The development and expression of customary international law becomes relevant, as once a norm of customary international law has developed, it binds all states except persistent objectors.

This article is divided into six parts. Part 2 contextualises the use of the persistent objector doctrine within the context of emerging SOGI rights under customary international law. Part 3 provides a discussion on the different meanings of "universality". Part 4 provides a brief background to the persistent objector doctrine, its mechanics, its functional purposes, and its applicability to international human rights law. Part 5 explores the

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<sup>8</sup> Lau 2005 *Chi J Int'l L* 501.

<sup>9</sup> *Universal Declaration of Human Rights* (1948) (UDHR).

<sup>10</sup> *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW).

<sup>11</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) (CERD).

<sup>12</sup> *International Covenant on Civil and Political Rights* (1966) (ICCPR).

<sup>13</sup> *International Covenant on Economic Social and Cultural Rights* (1966) (ICESCR).

responses of seven African states to Resolution 32/2 to highlight the practical use of the persistent objector doctrine and arguments centred on "universality". Part 6, the concluding part, argues that the persistent objector doctrine would have no application to SOGI rights under customary international law once crystallised, and suggests how human rights courts could approach the application of the persistent objector doctrine in this regard.

## **2 Customary international law, sexual orientation, gender identity and the persistent objector doctrine**

The process of establishing customary international law is difficult to delineate and customary norms are therefore often challenged. Dressed in language such as "ripeness" and "maturity", referring to state "practice" and "beliefs", customary international law has mostly been abandoned by states as their preferred source of law governing their relationships with one another.<sup>14</sup> This is particularly true within the domain of international human rights law, where the world has witnessed a proliferation of treaties in the last 60 years.<sup>15</sup> However, in the absence of treaty law the "constant" and "uniform" practice referred to by the International Court of Justice (ICJ) in the *Asylum Case (Columbia v Peru)*<sup>16</sup> becomes important, alongside any permissible defence against such practice, such as the persistent objector doctrine.<sup>17</sup>

Currently, an increasing number of states<sup>18</sup> is arguably directed in their actions by an acceptance of SOGI as a prohibited ground without a direct reference to SOGI in the ICCPR or the ICESCR, for example. The indication

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<sup>14</sup> Loschin 1996 *UC Davis J Int'l L Pol'y* 148.

<sup>15</sup> Loschin 1996 *UC Davis J Int'l L Pol'y* 148.

<sup>16</sup> *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266 (hereafter the *Asylum Case*).

<sup>17</sup> Both constant and uniform usage and the persistent objector are discussed in this case.

<sup>18</sup> ILGA 2016 [https://ilga.org/downloads/summary\\_SOGIESCatUPR\\_report.pdf](https://ilga.org/downloads/summary_SOGIESCatUPR_report.pdf); Arc International 2016 <http://arc-international.net/global-advocacy/human-rights-council/32nd-session-of-the-human-rights-council/appointing-an-independent-expert-on-sexual-orientation-and-gender-identity-an-analysis-of-process-results-and-implications/ii-the-process-leading-up-to-the-resolution-2016/>. Referring to the over one hundred States from all regions of the world that have made voluntary commitments to address violence and discrimination based on sexual orientation and gender identity in the context of the Universal Periodic Review. More than two thirds of all States that received such recommendations accepted at least one (and often several) such recommendations, indicating that a majority of States welcomes constructive dialogue and has made express commitment to addressing these human rights concerns. Also referred to by the Dutch representative to the UNHRC: ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 3.2.6 statement by the Netherlands, Mr. Roderick Van Schreven – 00:33:41.

that states increasingly view SOGI rights as protected under international and regional human rights law can, on the one hand, be explained by states' preference for a teleological interpretation of the ICCPR, for example, as provided for under article 31 of the VCLT.<sup>19</sup> In this regard the direction referred to above draws on the "object and purpose" of the ICCPR, which arguably confirms the universality in application of all human rights. This is established, for example, by the reference in the preamble to the ICCPR to the "inherent dignity of the human person". On the other hand, the direction referred to above can equally be viewed as state practice, inspired by a purposeful interpretation of article 2(1) of the ICCPR, for example.<sup>20</sup>

It is a well-established fact under international law that treaty provisions and states' interpretations of their obligations under such provisions may inspire customary international law to develop in a certain direction. As the ICJ concluded in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*,<sup>21</sup> even if treaty provisions and customary law deal with the same subject matter (in this case the general prohibition of discrimination), customary international law exists independently of treaty law.<sup>22</sup>

Importantly, as expressed in article 31(3)(c) of the VCLT, when interpreting a treaty "[a]ny relevant rules of international law applicable in the relations between the parties" should be taken into account, together with the context of the specific treaty. As suggested by Sands, article 31(3)(c) is "available to assist in resolving ... conflicts between treaty and custom".<sup>23</sup> It is possible to consider a scenario where the protection of SOGI rights would develop under customary international law to assist a court in interpreting a non-discrimination clause in a human rights treaty. It is also possible to imagine a scenario where a court, based on state practice alone, could directly apply SOGI protection under customary international law. As expressed in the introduction, the aim of this article is not to pronounce on whether customary international law has developed to protect SOGI rights *per se* but rather to

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<sup>19</sup> *Vienna Convention on the Law of Treaties* (1969) (VCLT).

<sup>20</sup> Which reads: "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* [emphasis added]". See for example *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (1994) 8.7 (hereafter the *Toonen* case).

<sup>21</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 (hereafter the *Nicaragua* case).

<sup>22</sup> *Nicaragua* case paras 172-178.

<sup>23</sup> Sands 2014 *Yale Hum Rts & Dev LJ* 88.

identify the importance of customary international law in developing SOGI rights, and from this vantage point to analyse the effect of unilateral statements by states in detracting from the basic principle of the universality of human rights.

Under international law a state's only defence against a legal obligation contained under a norm of customary international law is its persistent objection to such a norm. According to Lau the persistent objector, in line with this doctrine, is exempt from the norm after it becomes law, "so long as the state can rebut the assumption that it acquiesced to the norm and prove that, instead, it exercised clear and consistent objections throughout the norm's emergence".<sup>24</sup> The persistent objection to a principle serves a two-fold purpose from the perspective of the objector: it may impede the development of the principle as it may alter other states' behaviour, and as expressed by Stein, in the final instance it permits an individual state to "opt out of new and otherwise universal rules of international law".<sup>25</sup>

However, as argued in this article, in the context of human rights, more specifically SOGI rights, the application of the persistent objector doctrine creates contradictory results that do not align with the universal purpose and objective of international human rights law.<sup>26</sup> As Lau points out, and as referred to in the introduction, "[t]he human rights regime's universalist assumption is at odds with the effects of the persistent objector doctrine".<sup>27</sup> If states are allowed to exempt themselves from international human rights norms, the universal nature of human rights law is automatically compromised.<sup>28</sup> Therefore, the persistent objector doctrine may very well be compatible with other areas of international law, but not with universal human rights law, as further explored under 4.

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<sup>24</sup> Lau 2005 *Chi J Int'l L* 498.

<sup>25</sup> Stein 1985 *Harv Int'l LJ* 457.

<sup>26</sup> The Human Rights Committee (HRC) has taken the view that a reservation to the obligation contained in Art 2 of the ICCPR to respect and ensure the rights, and to do so on a non-discriminatory basis, would be contrary to the object and purpose of the Covenant. See Human Rights Committee *General Comment No 24: Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant on Reservations* CCPR/C/21/Rev.1/ Add.6 (1994) para 9.

<sup>27</sup> Lau 2005 *Chi J Int'l L* 501.

<sup>28</sup> Lau 2005 *Chi J Int'l L* 501.

### 3 Sexual orientation and gender identity rights and the battle over what is "universal"

The modern origin of the universal characteristic of human rights law is found in the UDHR, where it is stipulated that "[a]ll human beings are born free and equal in dignity and rights" and that "[e]veryone is entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind". The concept of universality is furthermore well described in article 5 of the *Vienna Declaration and Programme of Action (Vienna Declaration)*,<sup>29</sup> confirming that:

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, religious and cultural backgrounds must be borne in mind, it is a duty of States regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms.

As is evident in both declarations, the universality principle is closely related to the principles of equality and non-discrimination, which are not mutually exclusive. As a basic principle, universality does not consider differences but simply humanity. Therefore, human rights shall have universal application to all. Universality is a concept that Arendt aptly describes as a "right to have rights".<sup>30</sup> The discrimination and equality aspects of human rights have been added to further accentuate the principle of universality. Therefore, human rights shall have universal and equal application to all. This has worked well in terms of highlighting groups of persons in need of specific protection, but has also added a layer of ambiguity, as only certain differences seemingly give rise to protection. This is certainly not in line with the universality principle itself. The Inter-American Court of Human Rights (IACtHR) has eloquently described the relationship between universality and non-discrimination, emphasising that:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual ... [i]t is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.<sup>31</sup>

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<sup>29</sup> *Vienna Declaration and Programme of Action* (1993).

<sup>30</sup> Arendt *Origins of Totalitarianism* 293-294.

<sup>31</sup> *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* OC-(1984) 4/84 IACtHR para 55.



Therefore, universality, or the right of everyone to have rights, as expressed by Arendt,<sup>32</sup> is a prerequisite to dignity, which embraces all fundamental human rights.

In the context of SOGI rights the use of the term "universal" can best be described as a slippery slope; where the extra-cultural nature of human rights law, that is, its applicability to all regardless of cultural or religious affiliations or beliefs, is often conflated or replaced by a (mistaken<sup>33</sup>) requirement of the universal acceptance of SOGI rights. During the voting session at the UNHRC, the representative of the Nigerian delegation, as further discussed under 5, articulated this conflation when he stated that "sexual orientation and gender identity still do not enjoy universal popularity and acceptability to qualify for a human rights issue ... the vast majority of nations have not accepted LGBT rights".<sup>34</sup> However, as argued in this article, "universal" signifies that all human rights are attached to all human beings, not accepted by all states at all times. The definition of "universal" in the UDHR means it is not conditional on a widespread acceptance – it is a pre-condition upon which the human rights law regime rests. As such, the core value of the UDHR, for the purpose of the discussion in this article, does not primarily lie in the rights set out, or the non-discrimination clause presented, but in its "universal" application.

The question about the universality of human rights is furthermore intimately linked with the question of which source would create "universality" in application. Arguably, as put forward by D'Amato, customary international law is the only universal international law – as once it has matured, it binds all.<sup>35</sup> The primary question then becomes whether there is enough evidence to conclude that the concept of the "universality" of human rights, as defined above, has emerged as a general principle of international law as referred

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<sup>32</sup> Rudman 2015 *AHRLJ* 6.

<sup>33</sup> This can be contrasted with the test for customary international law, where, even though the word "universal" often features in the statements of states, there is no need for a practice to actually be "universal". As stipulated by the Special Rapporteur to the International Law Commission on the identification of customary international law, "for a rule of general customary international law to emerge or be identified the practice need not be unanimous (universal); but, it must be 'extensive' or, in other words, sufficiently widespread". International Law Commission *Second Report on Identification of Customary International Law* by Michael Wood, Special Rapporteur Sixty-sixth Session Geneva (5 May-6 June, 7 July-8 August 2014). Also see *North Sea Continental Shelf* [1969] ICJ Rep 3 para 104 (Separate Opinion of Ammoun J) and para 229 (Dissenting Opinion of Lachs J) and generally para 74.

<sup>34</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 2.10 Nigeria, Mr Peters Omologbe Emuze – 00:12:55.

<sup>35</sup> D'Amato 2010 <https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/116/> 2.

to in article 38(b) of the Statute of the ICJ. If it is accepted that at least part<sup>36</sup> of the rights set out in the UDHR have become firmly established as customary international law, the basic principle on which they exist must arguably at the very least be afforded the same status. If this argument is reflected against the discussion in the first report of the International Law Commission (ILC) on *jus cogens* by the Special Rapporteur on this topic, indicating that the prohibition of torture, slavery, genocide and non-discrimination have been universally identified as not only part of customary international law but also as *jus cogens* norms,<sup>37</sup> it would arguably lead to the conclusion that the international community has not only accepted that these rights have gained a sufficiently widespread acceptance (and that there is no valid defence against a violation of these rights), but that the principle underlying these rights – the principle of universality in application – has, at the very minimum, been accepted as a norm under customary international law.

As an example, Yasseen suggested as early as in 1966 that "the concept of *jus cogens* in international law [is] unchallengeable and ... [n]o specialist in international law could contest the proposition that no two States could come to an agreement to institute slavery".<sup>38</sup> As suggested in this article, it follows as a logical outcome of this understanding of the *jus cogens* nature of slavery that it would be incomprehensible, under international law, to justify the enslavement of a particular human being based on any ground; that is, the prohibition of slavery is based on its universal application to all human beings. If this conclusion is accepted, it remains to be explored whether the persistent objector doctrine can act as a valid defence against any human rights norm.

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<sup>36</sup> For further discussion on what rights qualify as part of customary law and particularly the position of socio-economic rights, see for example Von Bernstorff 2008 *EJIL* 913 and Hannum 1996 *Ga J Int'l & Comp L* 289.

<sup>37</sup> *First Report on Jus Cogens by Dire Tladi, Special Rapporteur International Law Commission Sixty-eighth Session, Geneva* (2 May-10 June, 4 July-12 August 2016) A/CN.4/693. It is important to acknowledge that this report did not conclude on any norms of *jus cogens* nature but discussed at length the possible principle that they could be viewed as having achieved this status.

<sup>38</sup> Summary Record of the 828<sup>th</sup> Meeting, Yearbook ... 1966, vol. I (Part I), para 26, at p 38. Cited in *First Report on Jus Cogens by Dire Tladi, Special Rapporteur International Law Commission Sixty-eighth Session, Geneva* (2 May-10 June, 4 July-12 August 2016) A/CN.4/693 para 32.

## 4 The persistent objector doctrine

### 4.1 *The mechanics of the persistent objector doctrine*

Until the early 1960s there was no real support for the persistent objector doctrine, as the international community from 1945 onwards consisted of a fairly homogenous set of states, dominated by the power of a handful of central powers. The 1960s and 70s saw the dawn of new African, Asian and Latin-American states through the process of de-colonialisation. The emergence of these new states together with the rise in influence of the Eastern European bloc radically changed the power balance in the international community and upset, as indicated by Weil, the "delicate, indeed, precarious, equilibrium"<sup>39</sup> needed to formulate customary international law. As Western states felt that they were losing control over the formulation of customary international law, led by the United States (US) they introduced the persistent objector doctrine as a response to the fragmentation of customary international law.<sup>40</sup>

As mentioned in the introduction, when a legal norm has crystallised into customary international law it is automatically binding on all states. No state can opt out unilaterally.<sup>41</sup> As Schachter explains, if a state were to be allowed to opt out of customary international law based on its own interests, this would amount to a complete denial of the very existence of customary international law.<sup>42</sup> When this is combined with the aspect of the universal application of human rights law, this problem is superimposed.

The formation of customary international law requires that a critical mass of states recognise the norm as compelling law and act on it as such. Customary international law develops over time and it is during the time when the norm is gradually emerging that the persistent objector doctrine may become relevant. Stein indicates that the persistent objector doctrine will find progressively more expression in modern international law because of the rapid formulation of customary international law.<sup>43</sup> Already in 1985 he provided the analysis that the *modus operandi* of classic international law was to answer the question of what states should have done by asking what they have done.<sup>44</sup> In modern international law, as pointed out by Loschin, "the modern process is prospective: multilateral conventions are written with

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<sup>39</sup> Weil 1983 *AJIL* 433-434.

<sup>40</sup> American Law Institute *Restatement of the Law Third* ch 1.

<sup>41</sup> Akehurst 1974-1975 *British Ybk Intl L* 24-26.

<sup>42</sup> Schachter *International Law in Theory and Practice* 38.

<sup>43</sup> Stein 1985 *Harv Int'l LJ* 457.

<sup>44</sup> Stein 1985 *Harv Int'l LJ* 465.

a view to what states should do now and in the future".<sup>45</sup> Therefore, the strict examination of state practice has lost its primacy in the methodology of international law and has begun to wither. As succinctly pointed out by Stein:

Correspondingly, *opinio juris* is no longer seen as a consciousness that matures slowly over time (and finally imparts obligatory force to a practice once motivated by habit, convenience, or moral sentiment), but instead as a conviction that instantaneously attaches to a rule believed to be socially necessary or desirable.<sup>46</sup>

In basic terms, the persistent objector doctrine operates under five main conditions. Firstly, the state must start objecting to the rule as the rule emerges – and it must continue to do so. The objection can take different forms and take place in different forums. As explained by Dumbery, an objection can include:

[S]tatements made during treaty negotiations, pleadings before national and international tribunals, voting and statements at international conferences, diplomatic communications, the promulgation of national laws, statements and reservations made when signing/ratifying treaties, etc.<sup>47</sup>

Secondly, there must be clear evidence of the objection. Thirdly, the objecting state must refute any assumption of acceptance of the rule. Fourthly, silence or failure on behalf of the objecting state is interpreted as acceptance. Finally, objections must be consistent over time and the state must invoke its objection whenever it is relevant.<sup>48</sup>

However, as concluded by Lau, even though these are the conditions for a successful application of the persistent objector doctrine, the definition of an "objection" and the "consistency" thereof are unsettled issues under international law.<sup>49</sup> There are less than a handful of cases where international forums have dealt with these issues. In the frequently cited *Asylum Case* and *Anglo Norwegian Fisheries Case (United Kingdom v Norway)*<sup>50</sup> the issue of the persistent objector doctrine was dealt with *obiter* and both cases were decided on a different ground, giving little guidance as to the definitions related to the persistent objector doctrine. These cases are

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<sup>45</sup> Loschin 1996 *UC Davis J Int'l L Pol'y* 149.

<sup>46</sup> Stein 1985 *Harv Int'l LJ* 465.

<sup>47</sup> Dumbery 2010 *ICLQ* 781.

<sup>48</sup> Loschin 1996 *UC Davis J Int'l L Pol'y* 149; Colson 1986 *Wash L Rev* 965968.

<sup>49</sup> Lau 2005 *Chi J Int'l L* 498.

<sup>50</sup> *Anglo Norwegian Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116 (hereafter the *Fisheries Case*).

also less relevant in the context of international human rights law, as they did not feature any human rights norms.<sup>51</sup>

In the only available human rights case, *Michael Domingues v United States*,<sup>52</sup> the Inter-American Commission (IACom) gave the application of the persistent objector doctrine a nod of approval. In this case the US raised the persistent objector doctrine as a defence against allegations that its use of the juvenile death penalty violated customary international law. In the end, the IACom asserted that the persistent objector doctrine was an ineffective defence to the use of the death penalty for juveniles *per se*, as this norm had reached the status of *jus cogens*.<sup>53</sup> However, it confirmed that in its opinion the persistent objector doctrine may be raised as a defence against the application of a human rights norm. It is important to point out that it is mainly the US that has supported and insisted on the validity of the persistent objector doctrine in this context and that this decision has not been confirmed by any other regional or international court since 2002.<sup>54</sup>

#### **4.2 The application of the persistent objector doctrine in the domain of human rights law**

The persistent objector doctrine has received extensive critique in terms of its application as a general defence to a customary international law norm. In summation, this critique has been based on the following grounds: (i) the lack of actual state practice supporting it; (ii) its logical incoherence and its inconsistent application; and (iii) the fundamental challenge it represents to the concept of customary international law.<sup>55</sup> Even though these issues are underlying factors in any critique of the persistent objector doctrine, this part will essentially focus on the critique levelled against the application of the persistent objector doctrine specifically within the domain of international human rights law. It is worth noting, however, as a point of departure, that "no tribunal has ever ruled that the status of persistent objector prevented the application of a norm of customary law to the objecting State" and as such it can be concluded that even though it is utilised by states it is still a fictive defence.<sup>56</sup>

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<sup>51</sup> Lau 2005 *Chi J Int'l L* 500.

<sup>52</sup> *Michael Domingues v United States* Case 12.285 Rep 62/02 IACom, Doc 5 rev 1 913 (2002).

<sup>53</sup> It is questionable whether this particular norm has obtained the status of *jus cogens*, but as this particular issue is of no further assistance to the main argument it will not be further pursued.

<sup>54</sup> Dumberry 2010 *ICLQ* 779-780.

<sup>55</sup> Dumberry 2010 *ICLQ* 784.

<sup>56</sup> Dumberry 2010 *ICLQ* 802.

Not much work has been done on the use of the persistent objector doctrine within the scope of human rights law. Below, this article explores Lau's main theory. His theory is constructed around three basic questions: (i) whether a state may opt out of an emerging human rights norm by objecting to it during the ripening phase of customary international law; (ii) what role the universality of human rights law plays in this regard; and (iii) whether there should be a complete bar against the persistent objector doctrine under human rights law?

In Lau's analysis of the persistent objector doctrine and its application to human rights law he focusses on two important aspects of customary international law, namely state consent and a state's ability to foresee its liabilities under international law. To this, he adds the universal nature of international human rights law as an underlying factor relating to how states conceptualise or should conceptualise the persistent objector doctrine in this particular context.

Regarding the role of the persistent objector doctrine in preserving state dissent, there are several examples that lead to the conclusion that consent in modern international law plays a diminishing role. The emergence of universal jurisdiction over certain crimes, the fact that the consent of the new states created after the period of de-colonialisation was not sought in terms of the already existing international standards and the growing support for different types of interventions in the sovereign affairs of states all point in this direction.<sup>57</sup>

Arguing as a positivist and demonstrating the existence of universal human rights by noting the acceptance and ratification of human rights instruments by a vast majority of states regardless of their cultural background, the most important contribution of Lau<sup>58</sup> is the notion of what he refers to as "original consent". As said under 3 above, the main assumption supporting the international human rights law regime is the notion of universality, and as suggested by Lau:

The UDHR and the Vienna Declaration embody states' informal consent to the inextricable universality of human rights law. Participation in the UN human rights regime - which grew out of the UDHR - should itself be considered an informal expression of consent to the regime's underlying assumption of universalism.<sup>59</sup>

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<sup>57</sup> Lau 2005 *Chi J Int'l L* 501-502.

<sup>58</sup> Lau 2005 *Chi J Int'l L* 503.

<sup>59</sup> Lau 2005 *Chi J Int'l L* 503.

This idea fits well with the argument presented under 3 above, that the core value of the UDHR is not primarily the rights but its "universal" application. As such, it must be accepted that at least part of the rights set out in the UDHR (as further argued above under 3) have become firmly established as customary international law, the basic principle in terms of which they exist must at the very minimum be afforded the same status. Tied in with the idea of original consent, this would yield the result that "if a state participates in the UN human rights regime but later requests to excuse itself from a specific human rights [norm] because of its objections during the specific law's emergence, that request should be refused".<sup>60</sup> Principles of consent are not violated, because the state had already consented to the universal application of all human rights to all human beings.

Regardless of whether the universality of human rights is viewed from the position of "original consent", as expressed by Lau, or as an unequivocal precondition to any or all human rights, as suggested under 3, the end result is the same. The idea that the universality of human rights is a precondition to the human rights regime is a *sine qua non* without which this field of law could arguably not exist. Any state that seriously argues against this point would not only violate the fundamental principles of the *Charter of the United Nations*<sup>61</sup> but would also, in repudiating its support for this pre-condition, have to distance itself from the entire human rights law regime. It is worrying but evident from the discussion under 5 below that such threats are being made.

The second function of the persistent objector doctrine is that it gives states the opportunity to predict their legal obligations under customary international law. As mentioned above, customary international law develops over time, sometimes in an imprecise fashion. This arguably makes it hard for states to ascertain when customary international law has ripened; that is, when states must start complying with the norm. However, this purpose is rapidly becoming less and less significant, as international human rights litigation is becoming more and more frequent.<sup>62</sup> Arguably, where the position of customary international law is disputed, international case law, such as judgments from the ICJ or the regional human rights courts (the IACtHR, European Court of Human Rights (ECtHR) and African Court on Human and Peoples' Rights (ACtHPR), as referred to under 4.3) can act as a subsidiary source of international law, as referred to in article

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<sup>60</sup> Lau 2005 *Chi J Int'l L* 503.

<sup>61</sup> See art 1(3) of the *Charter of the United Nations* (1945) "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction".

<sup>62</sup> Lau 2005 *Chi J Int'l L* 506.

38(d) of the Statute of the ICJ. In this regard, it is important to acknowledge that these bodies are consent-based: that is, states subject themselves to the jurisdiction of these courts. As concluded by Lau<sup>63</sup>, "[a]s far as the human rights context is concerned, the doctrine should be limited to cases in which foreseeability is truly at issue ... [t]hat is to say, the doctrine should only be honoured if there is not definitive and applicable case law regarding the human rights norm at issue".

### 4.3 The foreseeability of state obligations related to SOGI rights

As foreseeability is a key function of the persistent objector doctrine, it is of interest to further explore what state obligations have already been defined by key human rights forums. Within the context of the UN Universal Periodic Review, more than one hundred states from all regions of the world have made voluntary commitments to address SOGI-based violence and discrimination.<sup>64</sup> Furthermore, the broad-based acceptance of SOGI rights by the main UN treaty bodies is undisputed.<sup>65</sup> To exemplify this, the Human Rights Committee (HRC) accepted sexual orientation and sexual identity as prohibited grounds in *Toonen v Australia*,<sup>66</sup> and the United Nations Committee on Economic, Social and Cultural Rights, in its General Comment No. 20 defined "[o]ther status" in article 2(2) of the ICESCR as including sexual orientation. As such, state parties to the ICESCR should:

[E]nsure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or

<sup>63</sup> Lau 2005 *Chi J Int'l L* 510.

<sup>64</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 3.2.6 statement by the Netherlands, Mr Roderick Van Schreven – 00:33:41.

<sup>65</sup> See for example the *Declaration on Human Rights and Sexual Orientation and Gender Identity* (2008); *Human Rights, Sexual Orientation and Gender Identity* HRC Res 17/19, UN Doc A/HRC/RES/17/19 (2011); *Report on Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity by the United Nations High Commissioner for Human Rights* UN Doc A/HRC/19/41 (2011); *Human Rights, Sexual Orientation and Gender Identity* HRC Res 27/32, UN Doc A/HRC/RES/27/32 (2014); *Report of the United Nations Special Rapporteur on the Right to Education* UN Doc A/65/162 (2010) 23; ESCR Committee *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (2009) (hereafter ESCR Committee *General Comment 20*); Committee on the Rights of the Child *General Comment 13: The Right of the Child to be Free from all Forms of Violence* UN Doc CRC/C/GC/13 (2011) paras 60 and 72(g); Committee against Torture *General Comment 2: Implementation of Article 2 by States Parties* UN Doc CAT/C/GC/2 (2008); Committee on the Elimination of Discrimination against Women *General Recommendation 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* UN Doc CEDAW/C/GC/28 (2010).

<sup>66</sup> *Toonen* case 8.7.



intersex often face serious human rights violations, such as harassment in schools or in the workplace.<sup>67</sup>

The approach of the existing regional systems indicates that there is equal evidence that SOGI forms part of the basic prohibited grounds of discrimination, supporting the idea that SOGI rights are indeed universal in application. The IACtHR confirmed the universality of SOGI rights in *Karen Atala and Daughters v Chile*<sup>68</sup> and later in its 2017 Advisory Opinion on gender identity and expression<sup>69</sup> (Advisory Opinion). In the Advisory Opinion, the IACtHR confirmed that member states of the *American Convention on Human Rights*<sup>70</sup> have an obligation to permit transgender individuals to change their names and genders on identity documents, to recognise same-sex marriage, and to ensure the economic rights of those in same-sex relationships. The IACtHR concluded that state recognition of a person's gender identity is a vital component of guaranteeing transgender individuals access to the full enjoyment of their human rights.<sup>71</sup> In the Advisory Opinion, the IACtHR importantly established that it defines gender identity as an internal and individual experience of gender that may not align with the sex assigned at birth.<sup>72</sup> It confirmed that article 1.1 (the right to non-discrimination) of the IACom prohibits discrimination based on a person's gender identity, gender expression, or sexual orientation.<sup>73</sup> The jurisprudence of the ECtHR is even more comprehensive.<sup>74</sup> It has over time

<sup>67</sup> ESCR Committee *General Comment 20* para 32.

<sup>68</sup> *Karen Atala and Daughters v Chile* IACHR (23 July 2008) Ser L/Doc 22 Rev 1.

<sup>69</sup> *Obligaciones Estatales en Relación Con el Cambio de Nombre, la Identidad de Género, Y los Derechos Derivados de un Vínculo Entre Parejas del Mismo Sexo* IACtHR Advisory Opinion OC-24/17 (2017) (hereafter Advisory Opinion OC-24/17).

<sup>70</sup> Organization of American States *American Convention on Human Rights* "Pact of San Jose" Costa Rica (1969) (IAC).

<sup>71</sup> Advisory Opinion OC-24/17 para 103.

<sup>72</sup> Advisory Opinion OC-24/17 paras 32(f), 68-78.

<sup>73</sup> Advisory Opinion OC-24/17 paras 32(f), 68-78.

<sup>74</sup> See *ADT v The United Kingdom* (App No 35765/97) (2000) 31 EHRR 803; *Alekseyev v Russia* (App Nos 4916/07, 25924/08 and 14599/09) (2010); *C and LM v UK* (App 14753/89) unpublished; *Cossey v UK* (App No 10843/84) (1990) 13 EHRR 622; *Dudgeon v The United Kingdom* (App No 7525/76) (1982) 4 EHRR 149; *EB v France* (App No 43546/02) (2008) 47 EHRR 509; *Fretté v France* (App No 3651/97) (2002) 38 EHRR 438; *Gas and Dubois v France* (App No 25952/07) (2010) ECHR 444; *Goodwin v UK* (App No 28957/95) (2002) 35 EHRR 18; *Hämäläinen v Finland* (App No 37359/09) (2014) ECHR 877; *Handyside v The United Kingdom* (App No 5493/72) (7 December 1976); *I v UK* (App No 25680/94) (2003) 36 EHRR 53; *Karlheinz Schmidt v Germany* (Judgment of 18 July 1994) Series A No 291-B; *Karner v Austria* (App No 40016/98) (2003) 38 EHRR 24; *Kozak v Poland* (App No 13102/02) (2010) 51 EHRR 16; *L and V v Austria* (App Nos 39392/98 and 39829/98) (2003) 36 EHRR 55; *Lustig-Prean and Beckett v The United Kingdom* (App Nos 31417/96 and 32377/96) (2000) 29 ECHR 548; *Marckx v Belgium* (App No 6833/74) (1979) 2 EHRR 330; *Modinos v Cyprus* (App No 15070/89) (1993) 16 EHRR 485; *Mugenzi v France* (App No 52701/09) (2014) ECHR 752; *Neulinger and Shuruk v Switzerland* (App No 41615/07)

moved from applying the right to privacy in *Dudgeon v UK*<sup>75</sup> and a number of subsequent cases<sup>76</sup> to striking down anti-sodomy laws in Europe and onto the judgment in *Salgueiro da Silva Mouta v Portugal*,<sup>77</sup> where the ECtHR argued that sexual orientation was a distinction prohibited by article 14 of the *European Convention on Human Rights* (ECHR). It has furthermore dealt with SOGI rights "in the context of the age of consent, freedom of assembly, expression and association, adoption, parental rights and obligations, housing tenure, social and employer benefits, military service, residence permits and extradition, gender reassignment, dress code, blood donation, registration of partnerships, personal refusal of service to lesbian, gay, bisexual and trans persons, and violence and the lack of investigation thereof".<sup>78</sup>

Under the last of the three regional human rights systems, the African system, the African Commission on Human and Peoples Rights (ACoMHR), has at least partially accepted the SOGI concept and its universal application. In Resolution 275 on *Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*<sup>79</sup> the ACoMHR, in referring to the rights of "all individuals", strongly urges states to:

[E]nd all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws

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(2010) ECHR 1053; *Norris v Ireland* (App No 10581/83) (1988) 13 EHRR 186; *PB and JS v Austria* (App No 18984/02) (2012) 55 EHRR 31; *Popov v France* (App 39470/07) (2012) ECHR 2070; *Rees v UK* (App No 9532/81) (1986) 9 EHRR 56; *S v UK* (App 11716/85) 47 DR 274; *Salgueiro Da Silva Mouta v Portugal* (App No 33290/96) (2001) 31 EHRR 47; *Schalk and Kopf v Austria* (App No 30141/04) (2011) 53 EHRR 20; *Sheffield and Horsham v the United Kingdom* (App No 23390/94) (1999) 27 EHRR 163; *Smith and Grady v The United Kingdom* (App Nos 33985/96 and 33986/96) (1999) 29 EHRR 493; *Tyrer v UK* (App No 5856/72) (25 April 1978) 2 EHRR 1 xxi; *Vallianatos v Greece* (App Nos 29381/09 and 32684/09) (2014) 59 EHRR 12; *WB v Federal Republic of Germany* (App No 104/55) (1955); *X v Austria* (App No 19010/07) (2013) ECHR 425; *X and Y v UK* (App No 9368/81) 32 DR 220; *X, Y and Z v The United Kingdom* (App No 21830/93) (1997) 24 EHRR 1071; and *Yousef v The Netherlands* (App No 33711/96) (2002) ECHR 716.

<sup>75</sup> *Dudgeon v United Kingdom* ECHR (23 September 1981) Ser A 45.

<sup>76</sup> *Norris v Ireland* ECHR (26 October 1988) Ser A 142; *Modinos v Cyprus* ECHR (22 April 1993) Ser A 259; *Lustig-Preen and Beckett v UK* (2000) 29 ECHR 548.

<sup>77</sup> *Salgueiro da Silva Mouta v Portugal* ECHR (21 March 2010) Ser A 741.

<sup>78</sup> Rudman 2015 AHRJ 6. See also ECHR 2018 [http://www.echr.coe.int/Documents/FS\\_Sexual\\_orientation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf); ECHR 2013 [http://www.echr.coe.int/Documents/FS\\_Homo\\_sexuality\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Homo_sexuality_ENG.pdf); ECHR 2013 [http://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf).

<sup>79</sup> *Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity* Adopted at the 55<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola (28 April-12 May 2014) (hereafter Resolution 275).

prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.<sup>80</sup>

This approach to SOGI rights has further been confirmed by the AComHR in its joint dialogue with the IACom on Human Rights and the UN under the theme of *Ending violence and other human rights violations based on sexual orientation and gender identity*.<sup>81</sup> In this regard it is essential to note that the AComHR, in performing both a protective and a promotional mandate under article 45 of the *African Charter on Human and Peoples' Rights* (ACHPR), refers in Resolution 275 to article 2 (non-discrimination), article 3 (the equal application of the law), article 4 (respect of their life and the integrity of the person) and article 5 (the prohibition of torture and other cruel, inhuman and degrading treatment or punishment) in promoting the universal application of the ACHPR. The AComHR has also in two decisions on individual complaints<sup>82</sup> (albeit *obiter*) and a number of concluding observations<sup>83</sup> referred to sexual orientation as a prohibited ground. It further confirmed this position in its General Comments on article 14(1)(d) and (e) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, where the AComHR stated that "there are multiple forms of discrimination based on various grounds such as: race, sex,

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<sup>80</sup> Resolution 275 para 4.

<sup>81</sup> Centre for Human Rights *Ending Violence and Other Human Rights Violations*.

<sup>82</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* 245/02, (2006) AHRLR 128 (ACHPR 2006) (21st Activity Report of the ACHPR) para 169; *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication 284/2003, para 155: "Article 3 guarantees fair and just treatment of individuals within the legal system of a given country. The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation".

<sup>83</sup> See African Commission *Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius* (May 2009) para 15; African Commission *Concluding Observations of the African Commission on the 4th Periodic Report of the Republic of Uganda* (April-May 2011) para 11(xiii); African Commission *Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon 15th Extraordinary Session* (7-14 March 2014) para 84-85; African Commission *Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa 20th Extraordinary Session* (9-18 June 2016) para 32(i). African Commission *Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the ACHPR 17th Extraordinary Session* (19-28 February 2015); African Commission *Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the ACHPR 57th Ordinary Session* (4-18 November 2015) paras 81 and 126.

sexuality, [and] sexual orientation".<sup>84</sup> A similar position was suggested in its General Comment No 4, where the AcomHR indicated that it uses a non-exhaustive list of grounds of discrimination, which includes SOGI.<sup>85</sup>

The jurisprudence and decisions of the regional judicial and quasi-judicial bodies as well as the persuasive statements of all the major UN treaty bodies amount to a clear sign that SOGI rights are grounded in the universal application of human rights. Therefore, if universality is the point of departure for the protection of all human rights, SOGI rights included, and the concept of universality forms part of customary international law and as such cannot be re-negotiated to embrace only certain human beings and certain rights, where does that leave the persistent objector doctrine? This question is explored in more detail below.

## 5 The African voice at the UNHRC

This part aims to analyse the statements of the seven<sup>86</sup> African states that made submissions during the voting procedure before the UNHRC in relation to Resolution 32/2. The objective of this section is to highlight the misconception of the universality argument as set out under 3, the cultural relativist approaches that feed into this misconception, and the use of the persistent objector doctrine as set out under 4, in this context.

It is important to point out that the statements analysed below do not reflect the full spectrum of the relevant states' policy, neither on human rights law in general nor specifically regarding SOGI rights. Nevertheless, the submissions related to below shed some light on the varying positions of these states on SOGI rights and on the very practical way in which the persistent objector doctrine is engaged.

### 5.1 *Establishing an Independent Expert on SOGI rights*

As mentioned in the introduction, the main objectives of Resolution 32/2 are to reaffirm that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the UDHR. Flowing from this objective it also aims to confirm that acts of violence and discrimination, in all regions of the world, committed against

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<sup>84</sup> AComHR *General Comments on Art 14(1)(d) and (e) of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* 52<sup>nd</sup> Ordinary Session (9 to 22 October 2012) para 4.

<sup>85</sup> *Final Communiqué of the 56<sup>th</sup> Ordinary Session of the African Commission of Human and Peoples' Rights* (2015) para 25.

<sup>86</sup> Nigeria, Morocco, Algeria, Botswana, Namibia, Ghana and South Africa.

individuals because of their sexual orientation or gender identity are deplorable; and to appoint, for a period of three years, an Independent Expert on SOGI rights. The main mandate of the Independent Expert on SOGI rights is to assess the implementation of existing international human rights treaties in order to find ways to overcome violence and discrimination against lesbian, gay, bisexual, transgender, intersex and queer persons, while identifying both best practices and gaps.

Resolution 32/2 was presented against the background of the previous resolutions on human rights, sexual orientation, and gender identity adopted by the UNHRC in 2011<sup>87</sup> and 2014.<sup>88</sup> Resolution 32/2 was brought to the UNHRC by seven states, all from Latin America.<sup>89</sup> Mexico, the only member with a seat at the UNHRC in 2016, led the arguments in favour of the resolution. Forty-two states originally sponsored Resolution 32/2; however, the only African state sponsoring the resolution, Angola, withdrew shortly before the proceedings commenced.<sup>90</sup>

## **5.2 Nigeria, Morocco and Algeria – persistent objectors?**

Nigeria, Morocco, and Algeria have previously objected to SOGI protection at the UNHRC, Nigeria by opposing Resolution 17/19 and Algeria and Morocco by opposing Resolution 27/32.<sup>91</sup> It is evident from the statements made by the representatives of these three delegations that they saw this as an opportunity to apply the persistent objector doctrine and further to refute any argument that customary international law has ripened in this regard. These states based their arguments squarely on an interpretation of universality to mean unanimity in state actions, and on accusations of revisionism. As a starting point it is notable that all three delegations referred to their full commitment to end violence and discrimination in all its forms – pinpointing their commitment to the universal application of human rights law to all.<sup>92</sup>

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<sup>87</sup> *Human Rights, Sexual Orientation and Gender Identity* HRC Res 17/19, UN Doc A/HRC/RES/17/19 (2011).

<sup>88</sup> *Human Rights, Sexual Orientation and Gender Identity* HRC Res 27/32, UN Doc A/HRC/RES/27/32 (2014).

<sup>89</sup> Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, and Uruguay.

<sup>90</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 3.2.5 President of the HRC, Mr Choy Kyonglim – 00:31:13.

<sup>91</sup> *Human Rights, Sexual Orientation and Gender Identity* HRC Res 27/32, UN Doc A/HRC/RES/27/32 (2014).

<sup>92</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 3.2.5 5.2.14 Nigeria, Mr Peters Omologbe Emuze – 03:04:40; para 5.2.26 Algeria, Mr Antar Hassani – 03:21:42; para 5.2.24 Morocco, Mr Mohamed Auajjar – 03:17:11.

In terms of invoking the persistent objector doctrine, the representative of the Nigerian delegation clearly objected, not only with its no-vote, but also by stating that, "[m]y government ... seriously object[s] to LGBT rights as human rights and have legislated against those rights".<sup>93</sup> Many references were also made to the non-consent to SOGI rights and the lack of universal acceptance of the SOGI concept. The representative of the Algerian delegation submitted that his government did not find it useful to "impose values that [were] not agreed upon universally on others"<sup>94</sup> while the Moroccan delegation questioned the universality and remarked that "[s]o, we are talking about the universality, when the common ground between human civilizations is achieved, whereas today we are facing a draft resolution that is against the values and the beliefs of at least 1.5 billion that belong to one civilization".<sup>95</sup> The Nigerian delegation furthermore noted that "this resolution will not serve any useful purpose for the vast majority of States that don't believe in it".<sup>96</sup>

It is evident from the statements quoted above that the battle over SOGI rights centres on the "correct" definition of "universal", which in itself is deeply ironic. In terms of drawing on the UDHR and in refuting what Lau refers to as the "original consent" or what this article has defined above as an "unequivocal precondition" to human rights law, the Nigerian representative referred to the introduction of Resolution 32/2 as representing:

[a] clear departure from the combined wisdom of the Declaration of Human Rights and call[ed] into question the legality of such an action under the guise of protection of gays and lesbians. Mr. President, allow me to remind this august body that this issue has not been recognized by the vast majority of legal systems as part of the international human rights structure, and that it has not received sanction by any legal framework, outside the acceptance of its existence in special privilege accorded under national law in some States. Due diligence must accrue to look at legislations in our attempts to form concepts and give them global legality.<sup>97</sup>

This statement also brings to the fore the opinion that SOGI rights are not part of international human rights law, which opinion is in sharp contrast to

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<sup>93</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 3.2.5 5.2.14 Nigeria, Mr Peters Omologbe Emuze – 03:04:40.

<sup>94</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.26 Algeria, Mr Antar Hassani – 03:21:42.

<sup>95</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.24 Morocco, Mr Mohamed Auajjar – 03:17:11.

<sup>96</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 3.2.5 5.2.14 Nigeria, Mr Peters Omologbe Emuze – 03:04:40.

<sup>97</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 2.10 Nigeria, Mr Peters Omologbe Emuze – 00:12:55.

the judgments, decisions and statements presented under 4.3 above. Furthermore, when they demonstrated their opposition to Resolution 32/2, it is evident that the proponents for the no-vote were also prepared to link the disregard for the universality of human rights law to the fundamental structures not only of the UNHRC but also the broader international community. As an example, in the statement by the representative of the Moroccan delegation the vote on Resolution 32/2 was referred to as "a very dangerous turning point" and the "beginning of a very dark period in the life of the Council where two-thirds of humanity and humankind will feel that they are outside the Council",<sup>98</sup> whereas the Nigerian representative referred to the vote as polarising.<sup>99</sup>

### **5.3 *Ghana, South Africa, Namibia and Botswana – accepting the development of SOGI rights under customary international law?***

While the Nigerian, Moroccan and Algerian statements are interesting from the perspective of invoking the persistent objector doctrine, using universality and consent as primary arguments, the positions of Ghana, Botswana, Namibia and South Africa all present interesting shifts, in one way or another, from the positions these states previously held.

Ghana represents perhaps the most interesting shift. It not only moved from a no-vote in terms of Resolution 17/19 in 2011 to abstaining in 2016, but also clearly acknowledged the development in regional law taking place in this timespan as a major factor contributing to its more positive position on SOGI rights. In his statement, before the final vote on Resolution 32/2, the Ghanaian representative referred to Resolution 275 and took cognisance of the fact that the resolution had been concluded against the background of what the AComHR found to be an alarming incidence of acts of violence, discrimination and other human rights violations that continue to be committed against individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity. In recognising the development in SOGI protection, the Ghanaian representative made the following statement, succinctly highlighting the tension between the development of customary international law and the domestic position:

[W]e are meeting at this time against the backdrop of what happened in Orlando. Ghana's Constitution prohibits discrimination of all kinds, and therefore the resolution of the African Commission on Human and Peoples'

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<sup>98</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.24 Morocco, Mr Mohamed Auajjar – 03:17:11.

<sup>99</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 2.10 Nigeria, Mr Peters Omologbe Emuze – 00:12:55.

Rights is in conformity with our Constitution. The laws of Ghana will not permit any individual to be persecuted or assaulted because of their sexual orientation ... But Mr. President, this is a very sensitive matter culturally in Ghana.<sup>100</sup>

In highlighting the gradual change in Ghana's position, the representative gave the following explanation:

[I]n 2011 Ghana voted against the resolution that has been referred to in the preambular paragraphs. But there has been evolution of thinking, partly because of the Orlando situation, and also because of the resolution of the African Commission on Human and Peoples' Rights.<sup>101</sup>

Clearly not prepared to outright contradict what is believed to be the sentiments of the Ghanaian people, which presumably gave rise to the characterisation of the issue as "a very sensitive matter culturally", but cognisant of the development of regional human rights law, Ghana chose not to invoke the persistent objector doctrine. Instead, it referred to an "evolution in thinking" which could be viewed as an indication of its perception of the development of customary international law in this regard.

The South African position represents a step in a different direction, although it also abstained from voting in the final round. Importantly, South Africa, as the main sponsor, directed the UNHRC to adopt Resolution 17/19, the first SOGI resolution in the history of the UNHRC. Equally, in 2012, in response to a motion from the United Arab Emirates to remove the terms "sexual orientation and gender identity" from the General Assembly Resolution on Extrajudicial, summary or arbitrary executions,<sup>102</sup> South Africa voted for retaining the SOGI reference.<sup>103</sup> Finally, in 2014, when the UNHRC adopted Resolution 17/32, South Africa was the only African state to vote for the resolution and consequently against the seven hostile amendments that preceded the final vote.<sup>104</sup>

Against this background it is interesting to analyse the 2016 response from the South African delegation to Resolution 32/2. From its previous actions and statements it was quite clear that it had accepted and in fact spearheaded the development of customary international law in this regard.

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<sup>100</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.28 Ghana, Mr Sammie Eddico – 03:22:51.

<sup>101</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.28 Ghana, Mr Sammie Eddico – 03:22:51.

<sup>102</sup> *Resolution on Extrajudicial, Summary or Arbitrary Executions* GA Res 67/168, UN Doc A/RES/67/168 (2012).

<sup>103</sup> *Reports of the Third Committee, 60<sup>th</sup> Plenary Meeting Thursday, 20 December 2012* UN Doc A/67/PV.60 (2012) 13.

<sup>104</sup> Jordaan 2017 *Politikon* 205.



This position overall was built on the domestic legal position where discrimination based on sexual orientation is prohibited.<sup>105</sup> For this reason the statement made by South Africa that "while [it] supported those parts of this resolution which focus primarily on ending violence and discrimination against LGBTI persons, [it] cannot support this resolution as it stands and will therefore abstain" raised serious concerns about its SOGI commitments.<sup>106</sup> The reasons provided had nothing to do, it seems, with its legal obligations or its policy position in this regard, but rather with the manner in which the sponsors approached the resolution. This is clearly reflected in the statements of the South African representative to the effect that "[g]randstanding, recklessness, brinkmanship and point-scoring will not take us anywhere" and "[h]ow the current sponsors have sought to build on the South African initiative of 2011, has added divisive dimensions and created unnecessary acrimony in this Council".<sup>107</sup>

Although it is not possible to confirm definitively why South Africa left the core group sponsoring the previous SOGI resolutions, Voss<sup>108</sup> suggests that domestic politics and regional pressure contributed the most to South Africa's decision to shift positions on SOGI. The South African approach is an interesting example as South Africa seems to be in complete agreement with the point of introducing this resolution and the fact that customary international law is developing towards consistent SOGI protection. It recognises its domestic obligation towards upholding SOGI rights, as reiterated in the statements before the UNHRC with reference to the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*). South Africa also confirms the position of the AComHR, that "no persons should be subjected to discrimination and violence on any ground including on the basis of sexual orientation".<sup>109</sup> From this perspective, it is difficult to understand its opposition to a resolution that carries exactly the same message.

The final two examples refer to the positions of Namibia and Botswana. Both states made submissions in the final stages of the procedures before the UNHRC. Botswana had earlier rejected Resolution 17/32, whereas Namibia

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<sup>105</sup> Section 9 of the *Constitution of the Republic of South Africa, 1996* refers to "sexual orientation as a prohibited ground".

<sup>106</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.10 South Africa, Ms Nozipho Mxakato-Diseko – 03:00:34.

<sup>107</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.10 South Africa, Ms Nozipho Mxakato-Diseko – 03:00:34.

<sup>108</sup> Voss 2018 *Hum Rts Rev* 9.

<sup>109</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.10 South Africa, M. Nozipho Mxakato-Diseko – 03:00:34.

had abstained. As with the statements discussed above, both submissions reiterated that the states did not condone violence or discrimination against any person.<sup>110</sup> However, even though both states confirmed this protection in their respective constitutions, they referred to the current development of customary international law and the lack, in their opinion, of the crystallisation of the law in this regard. The representative from Botswana indicated this by stating that "at international level and within international law there is no agreed definition or acceptance of the use of the terminology on sexual orientation and gender identity ... [i]t is in fact a concept that is still developing, even at international levels".<sup>111</sup> In the same vein the representative of the Namibian delegation referred to the "fact that there is no binding international instrument guiding us in the field of international human rights law which provides us with an agreed definition of sexual orientation and gender identity". This, she stated, "poses a legal lacuna for us".<sup>112</sup> It is interesting to note that these delegations did not object to the norm *per se* but questioned the maturity of customary international law with reference to domestic cultural and religious practices.

## 6 Conclusion

From the jurisprudence of the IACtHR and ECtHR it is evident that SOGI rights have been read into the IAC and the ECHR through the non-discrimination clauses giving effect to SOGI rights on the American and European continents. This interpretation of discrimination based on SOGI, mirrored by the main UN Treaty Bodies, has been established by the courts through a purposeful interpretation of the relevant provisions on the one hand and by their analysis of regional state practice on the other. In relation to the latter, the main objective of this article was to establish if SOGI rights, once confirmed as part of customary international law, would be susceptible to any unilateral defence against such a norm. As has been highlighted throughout this article, customary international law is currently developing and therefore it is now that the persistent objector doctrine can be invoked and also evaluated. Based on the three tenets of (i) universality (in application and negating the need for consent); (ii) existing case law; and (iii) the favourable outcome in the three SOGI resolutions presented before

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<sup>110</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.12 Botswana, Mr Mothusi Bruce Rabasha Palai – 03:03:11; para 5.2.30 Namibia, Ms Gladice Pichering – 03:28:02.

<sup>111</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.12 Botswana, Mr Mothusi Bruce Rabasha Palai – 03:03:11.

<sup>112</sup> ILGA 2016 <https://ilga.org/compilation-adoption-2016-sogi-resolution> para 5.2.30 Namibia, Ms Gladice Pichering – 03:28:02.

the UNHRC since 2011, this article concludes that neither consent nor foreseeability will justify the use of the persistent objector doctrine defence in the domain of SOGI rights once customary international law has matured.

The arguments based on the main functionalities of the persistent objector doctrine, to uphold consent and create foreseeability, find little or no reasonable, general application within international human rights law, due to the very nature of the law and the increasing availability of relevant jurisprudence. On the point of the nature of the law, the universality of all human rights fundamentally contradicts the persistent objector doctrine defence as used by Nigeria, Algeria and Morocco. As suggested in this article the reference to an "unequivocal pre-condition" based on customary international law and *jus cogens* instead of "original consent" would better frame the universality of human rights as separate from state consent, as the reference to consent, even captured as "original", gives a false notion of optionality.

On the point of foreseeability, in his final analysis<sup>113</sup> Lau suggests that the acceptance of the persistent objector doctrine should be limited to cases where foreseeability is strictly an issue. In other words, in cases where the customary international law norm is maturing, but where the contents of the norm or its application is so unclear that once it binds all, it is reasonable for a court to accept that a state could not possibly have foreseen the actual outcome of the customary international law norm. It is evident from the discussion under 4.3 that such an argument would not find application with regard to SOGI rights.

The statements made at the UNHRC by Nigeria, Morocco and Algeria are clear examples of persistent objections. However, while it will in future be possible for these states to find proof of their objections and the persistent nature thereof in support of a defence against SOGI rights based on the persistent objector doctrine, such a defence should be rejected. Importantly, state practice on SOGI rights on the African continent is not uniform in its rejection of SOGI rights. On the contrary, states such as Ghana, Namibia and Botswana exemplify an important change of direction.

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<sup>113</sup> Lau 2005 *Chi J Int'l L* 510.

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## List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AComHR	African Commission on Human and Peoples' Rights

ACtHPR	African Court on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AJIL	American Journal of International Law
British Ybk Intl L	British Yearbook of International Law
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
Chi J Int'l L	Chicago Journal of International Law
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
Fordham Int'l LJ	Fordham International Law Journal
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
Harv Int'l LJ	Harvard International Law Journal
HRC	Human Rights Committee
Hum Rts Rev	Human Rights Review
Hum Rts L Rev	Human Rights Law Review
IAC	American Convention on Human Rights
IACom	Inter-American Commission
IAcHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
LGBTBQI	Lesbian, Gay, Bisexual, Transgender, Queer and Intersex
SOGI	Sexual Orientation and Gender Identity
UC Davis J Int'l L Pol'y	UC Davis Journal of International Law and Policy
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council
US	United States
VCLT	Vienna Convention on the Law of Treaties

Wash L Rev

Yale Hum Rts & Dev LJ

Washington Law Review

Yale Human Rights and Development Law  
Journal